No. 88-538

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP J. BROWN, *et al.*,
Petitioners,

v.

1250 TWENTY-FOURTH STREET ASSOCIATES LIMITED PARTNERSHIP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent 1250 Twenty-Fourth Street Associates Limited Partnership, by J. W. Kaempfer, Jr., its general partner (hereafter "Associates"), respectfully prays that the Court deny the Petition for Writ of Certiorari to review the order of the United States Court of Appeals for the District of Columbia Circuit entered on June 28, 1988.

STATEMENT OF THE CASE

In December 1981, Petitioners Philip J. Brown, William J. Brown, and B&W Management, Inc. filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the District of Columbia (Nos. 81-

00698, 81-00709, 81-00701). Following a court-appointed examiner's report, a Trustee was appointed for the three bankruptcy estates in or about July 1982.

On November 8, 1983, the Trustee filed an amended plan of arrangement. The centerpiece of this plan was a 99-year ground lease of property located at 1250 24th Street, N.W., Washington, D.C. (the "Ground Lease") between The Kaempfer Company (Associates' predecessor in interest), as lessee and Petitioners as landlord. On December 23, 1983, the parties executed a first amendment to the Ground Lease (the "First Amendment") which provided that the tenant could seek a favorable rezoning of the leased property and, if successful, would be partially reimbursed for its costs by the landlord.

On January 10, 1984, the Bankruptcy Court confirmed the Trustee's amended plan of arrangement and directed the Trustee to execute on behalf of the bankruptcy estates the Ground Lease as amended by the First Amendment. Petitioners appealed the Bankruptcy Court order, but the order was affirmed by the District Court in July 1984.

In September 1984, Petitioners filed a motion to modify the plan of arrangement and sought to substitute another developer for The Kaempfer Company. Following an evidentiary hearing, the Bankruptcy Court denied Petitioners' motion. On October 11, 1984, the Trustee executed a Certificate of Ratification which ratified and executed the Ground Lease as amended by the First Amendment. On November 21, 1984, the Ground Lease and related transactions closed.

As detailed in the *Memorandum Opinion* of the District Court (Pratt, J.) dated May 13, 1986, (Appendix pp. 1a-18a), disputes arose between Petitioners and Associates in January 1986. Petitioners served on Associates default notices under the Ground Lease and disputed the calculation of ground rent under the formulas

set forth in the Ground Lease and the First Amendment. Associates filed an adversary proceeding seeking a declaration that the two default notices were invalid, a declaration that the rent formulas of the Ground Lease and First Amendment governed the calculation of rent, and an injunction to prohibit Petitioners from issuing any future default notices without prior determination from the Court that the proposed default notice is filed in good faith and is not frivolous. Petitioners filed an eight-count counterclaim alleging, *inter alia*, that the rent formulas in the Ground Lease and the First Amendment should be set aside on grounds of fraud. Significantly, Petitioners did not allege at this time the alleged "forgery" they would claim later.

After the action was referred from the Bankruptcy Court, District Court Judge Oberdorfer invalidated the two default notices on the ground that the Trustee, who had sole authority to act for the bankruptcy estates, had neither ratified nor consented to the issuance of the notices.

On May 13, 1986, District Court Judge Pratt issued a *Memorandum Opinion* granting Associates its requested relief and denying and dismissing each of Petitioners' claims. Judge Pratt held that the rent formulas in the Ground Lease and the First Amendment were unambiguous and could not be set aside on the grounds of fraud because (i) such allegations were time-barred under 11 U.S.C. § 1144, and (ii) the allegations were insufficient as a matter of law since Petitioners had a duty to read the documents, Petitioners had executed the documents, and Petitioners had even applied the formulas as Associates interpreted them in Petitioners' September 1984 motion to modify plan.

Petitioners filed a motion for reconsideration, which was denied. Petitioners then appealed that portion of the District Court's order relating to the validity of the

Ground Lease and First Amendment (D.C. Cir. No. 86-7007). On December 15, 1986, the Court of Appeals summarily affirmed the District Court (Appendix pp. 21a-22a). The Court of Appeals affirmed the District Court's dismissal of the allegations of fraud and misrepresentation: "Since the language of the lease is unambiguous, and appellants do not deny having read and initialed each page of the lease, appellants fail to state a claim of reasonable reliance on any representation made to them by appellees."

On or about January 14, 1987, Petitioners filed a petition for reconsideration in the Court of Appeals. For the first time in these proceedings, Petitioners alleged that one of the signatures of Philip J. Brown on the First Amendment was a forgery. Significantly, the alleged forgery was a signature witnessed by Nicholas A. Addams, Esq., Petitioners' attorney. Moreover, Petitioners did not dispute that the remaining signatures of Philip J. Brown on the First Amendment were genuine. Further, Petitioners did not and never have alleged that the "forgery" was attributable to Associates or any of the other parties. Indeed, Petitioners have never explained what legal significance the "forgery" could have or what motive anyone would have had to "forge" Philip J. Brown's signature on this document since the authenticity of Philip J. Brown's signature was of no legal significance. On February 1, 1987, the D.C. Circuit denied the petition for reconsideration without prejudice to Petitioners' right to file a motion for relief from judgment pursuant to Rule 60(b).

Over three months later, on May 12, 1987, Petitioners filed a Rule 60(b)(2) motion with the District Court. Following full briefing, the District Court denied the motion in a *Memorandum Order* filed November 18, 1987 (Appendix pp. 23a-29a). At the outset, the District Court correctly held that the allegations of forgery were irrelevant as a legal matter since the authenticity of

Philip J. Brown's signature had no bearing on the validity and enforceability of the First Amendment. It was the Trustee, and not Philip J. Brown, who had the sole authority to execute the documents on behalf of the Petitioners' bankruptcy estates. The Trustee knowingly ratified the First Amendment and, as the District Court found, there was no evidence that the Trustee relied on the presence of Philip J. Brown's signature in so doing. (Appendix p. 24a, n.2).

After determining that the allegations of forgery were irrelevant, the District Court then held that even if the allegations of forgery were legally significant, Petitioners' Rule 60(b) motion must nonetheless be denied because petitioners failed to demonstrate why they could not have discovered the evidence before judgment:

> In fact, defendants "discovered" the alleged irregularities in the First Amendment by having Philip Brown and several document experts examine the very same document which had been in their possession during the course of the litigation. Evidence in the possession of a party *before* judgment is rendered is logically *not* "newly discovered" evidence within the meaning of the Rule. In any case, defendants clearly had the *ability* to discover the alleged defect in the document long before our judgment.

(Appendix p. 26a) (emphasis in original, citations omitted). The District Court went on to note that in litigating over the terms and validity of the First Amendment, "a diligent party would have noted the contrast in terms, or unexplained discrepancies in interpretation, and examined the document to ensure its validity." (Appendix p. 26a). The District Court also found that Petitioners' unexplained failure to pursue the alleged forgery issue immediately after the District Court's May 13, 1986 opinion was "a virtual admission of their lack of due diligence." In the May 13 opinion, the Court noted

that defendants had a duty to read the contracts and their initials on the documents indicated they had.

As an alternatively sufficient ground to deny the Rule 60(b) motion, the District Court found that Petitioners failed to file the motion within a reasonable time, even assuming that their late discovery of the "forgery" was excusable:

> The one year limitation regarding the filing of Fed. R.Civ.P. 60(b)(2) motions reflects a policy embodied in the Rule that after one year concerns regarding the finality of judgment *absolutely* outweigh other concerns arising from the existence of newly discovered evidence. While this motion was filed barely within the one year time period, concerns for the sanctity of final judgments likewise weigh heavily here, where many parties have come to rely on our judgment, and where defendants have failed to demonstrate that they exercised due diligence in discovering the defects of the document *within their possession* prior to our judgment, and that they acted within a reasonable period of time after their "discovery" of this evidence, even assuming that their December discovery was excusable.

(Appendix, p. 28a) (emphasis in original).

On June 28, 1988, the Court of Appeals granted Associates' motion for summary affirmance of the November 18, 1987 order (Appendix, p. 30a). Petitioners filed a petition for writ of certiorari on September 26, 1988.

SUMMARY OF ARGUMENT

Petitioners have mischaracterized the opinions of the District Court and the Court of Appeals in order to fabricate an inter-circuit conflict. The District Court found in the exercise of its discretion and on the facts of the case that Petitioners were not entitled to relief from judgment pursuant to Fed.R.Civ.P. 60(b)(2) for two independently sufficient reasons. First, the District

Court held that Petitioners failed to exercise due diligence in "discovering" the "newly discovered evidence" since the document containing the alleged forgery had been in Petitioners' possession during the litigation, had been a focus of attention during the litigation, and had been expressly referred to in the judgment from which Petitioners sought relief. Second, the District Court held that Petitioners failed to file the motion for relief from judgment within a reasonable time even if their late "discovery" of the alleged forgery were otherwise excusable. Moreover, the District Court correctly held that the authenticity of Philip Brown's signature on the First Amendment was irrelevant as a matter of law because the Trustee was the only person with authority to execute the First Amendment on behalf of Petitioners, and the Trustee did in fact execute and ratify the First Amendment. In summarily affirming this District Court decision, the Court of Appeals correctly applied the law and deferred to the District Court's discretion to deny the motion.

REASONS FOR DENYING THE WRIT

I. The decision of the Court of Apeals does not conflict with decisions from other circuits regarding newly discovered evidence.

Pursuant to Rule 17 of this Court's rules, a writ of certiorari will be granted "only when there are special and important reasons therefor," including, for example "[w]hen a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter." This case involves only the denial of a Rule 60(b)(2) motion by a district court acting in its discretion and the summary affirmance of that order by the court of appeals. It is clear that the lower court decisions were fully in conformance with established jurisprudence regarding the denial of Rule 60(b) relief. This case does not present

any special or important reasons for granting certiorari and there is no apparent or actual inter-circuit conflict.

The District Court's decision to deny the Rule 60(b) motion and the Court of Appeals' affirmance were well-grounded in the facts of this case.[1] The trial court found that Petitioners had the document containing the alleged forgery in their possession prior to judgment. In this Court, Petitioners acknowledge that they possessed the First Amendment in 1986 at the time Associates moved for summary judgment before Judge Pratt. *See, e.g.*, Petition for Writ of Certiorari at 10, 14. Nevertheless, Petitioners have never explained why they could not have presented evidence of the alleged forgery prior to judgment, since the "forgery" was of Philip Brown's own signature and it was witnessed by his attorney, Nicholas A. Addams, Esq., who represented Petitioners in opposing the motion for summary judgment.

In order to fabricate an inter-circuit conflict, Petitioners mischaracterize the District Court opinion. The District Court found that Petitioners—who concededly had the "evidence of forgery" in their possession—did not exercise the required diligence in bringing the matter up prior to judgment or immediately thereafter. Contrary to the way Petitioners present the case to this

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[1] District Court Judge Pratt has overseen this litigation and related litigation for several years and is well acquainted with Petitioners' claims. *See, e.g., 1250 24th Street Associates Limited Partnership v. Brown*, 684 F. Supp. 326 (D.D.C. 1988) (modifying permanent injunction to protect Associates from Petitioners' groundless allegations and harrassing litigation tactics), *affirmed on opinion below*, August 12, 1988 (D.C. Circuit No. 88-7101); *Kaempfer v. Brown*, 684 F. Supp. 319 (D.D.C. 1988) (enjoining Petitioners from duplicative and harassing litigation against Associates' lender), *appeal pending* (D.C. Circuit No. 88-7102). *In re B&W Management, Inc.* (No. 87-3264, April 25, 1988) (affirming Bankruptcy Court's denial of Petitioners' motion to recuse), *appeal dismissed for want of jurisdiction*, September 23, 1988 (D.C. Circuit No. 88-7137).

Court, this is not a situation where a material fact occurred before judgment but the evidence of that fact did not come to light until after judgment. Rather, the District Court found that the evidence of the alleged forgery existed and was in Petitioners' possession prior to the entry of judgment but that Petitioners did not exercise due diligence to discover the alleged forgery.

In order to succeed on a Rule 60(b) motion, the movant must present evidence that is truly newly discovered or which could not have been found by due diligence. *United States v. Potamkin Cadillac Corp.*, 697 F.2d 491, 403 (2d Cir.), *cert. denied*, 462 U.S. 1144 (1983) (evidence not newly discovered when party's attorney was aware of fact throughout litigation). *Cf. Butler v. Pettigrew*, 409 F.2d 1205, 1207 (7th Cir. 1969) (plaintiffs who failed to present evidence at trial supporting their allegation of reliance on alleged false representations would not be granted a new trial to introduce such evidence since "[i]t is obvious from the nature of the element of reliance to plaintiffs' claim that plaintiffs could hardly assert such evidence as newly discovered.").

Petitioners try to cast this paradigmatic due diligence case as one involving "newly discovered evidence." To do this, they claim that the "new evidence" consists of expert witness reports prepared after the District Court's May 1986 order. But given the conceded fact that Petitioners had the First Amendment in their possession prior to that order and that the expert witneses examined the very document Petitioners had prior to judgment, Petitioners cannot claim that the expert reports are newly discovered evidence which could not have been obtained prior to judgment. *See Kansas City Area Transportation Auth. v. State of Missouri*, 640 F.2d 173, 175 (8th Cir. 1981) (party not entitled to 60(b)(2) relief when information was available to party prior to judgment even if report compiling information was not issued until after judgment); *Ursini v. Menninger*

Foundation, 384 F. Supp. 158, 162 (E.D. Cal. 1974) (evidence regarding defendant's minimum contacts was in the possession of plaintiff or plaintiff's parents at all relevant times; it was "inconceivable" that plaintiff or his attorney could not have obtained evidence with reasonable dilligence).

Moreover, copies of the First Amendment were filed in the District Court, the Bankruptcy Court, and in the land records of the District of Columbia. Evidence that is contained in public records at the time of trial cannot be considered newly discovered evidence. *Scutieri v. Paige*, 808 F.2d 785, 794 (11th Cir. 1987).

Finally, the "fact" which Petitioners alleged supported the vacating of judgment is an alleged forgery of Philip J. Brown's own signature on a document whose interpretation and application Petitioners extensively litigated. There can be no dispute that Philip J. Brown could and should have discovered the alleged forgery of his own signature on a document which was the focus of the underlying litigation.

Nor is there any dispute that Mr. Brown's own attorney, Nicholas A. Addams, Esq., witnessed the very signature of Philip J. Brown which Petitioners now claim to be a forgery.[2] Logically, if Petitioners' attorney knew or should have known about alleged irregularities, that allegation could have been brought to the District Court's attention prior to judgment if Petitioners and their attorney had exercised due diligence. *See United States v. Potamkin Cadillac Corp.*, 697 F.2d 491, 493 (2d Cir.), *cert. denied*, 462 U.S. 1144 (1983) (district court acted within its discretion in denying Rule 60(b)(2) relief

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[2] Petitioners have not challenged the authenticity of Nicholas A. Addams' signature on the witness line of the alleged forgery, and neither Petitioners nor their attorney ever proffered to the District Court how or why the attorney witnessed the allegedly forged signature of Mr. Brown.

when attorney acknowledged that he knew "all along" about newly discovered evidence).

For all of the above reasons, it is clear that the District Court correctly applied established precedent in denying Petitioners' motion for relief based on "newly discovered evidence." In summarily affirming that decision, the Court of Appeals did not create any conflict with other circuits. The cases cited by Petitioners as involving newly discovered evidence are simply inapposite to the present case involving the lack of due diligence and the absence of newly discovered evidence.

II. The lower court decisions were appropriate and fully justified by the facts of record.

In order to obtain relief under Rule 60(b)(2), on grounds of newly discovered evidence, the moving party must establish that: (1) the evidence was discovered after trial; (2) it exercised due diligence to obtain the evidence for trial; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that a new trial probably would produce a new verdict. *Rosebud Sioux Tribe v. A&P Steel, Inc.*, 733 F.2d 509, 515 (8th Cir.), *cert. denied*, 469 U.S. 1072 (1984).

It is patent that the District Court carefully weighed the relevant factors and properly exercised its discretion in denying the Petitioners' Rule 60(b) motion. Petitioners cannot demonstrate that there was a clear abuse of discretion in the District Court decision or, by implication, in the Court of Appeals' summary affirmance.[3]

[3] While nowhere mentioned in Petitioners' papers, the standard for appellate review of the denial of a Rule 60(b) motion is whether or not the district court abused its discretion. *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 263 n.7 (1978); *MacLeod v. D.C. Transit Systems, Inc.*, 283 F.2d 194 (D.C. Cir. 1960) (Burger, Circuit Judge). *See generally* 11 C. Wright & A. Miller, *Federal Practice and Procedure*, §§ 2857, 2872 (1973).

In denying the Petitioners Rule 60(b) motion, the Court considered whether the "newly discovered evidence" was material and correctly determined that it was not. The Court found that the allegations of forgery were irrelevant because the authenticity of Philip J. Brown's signature had no bearing on the validity or enforceability of the First Amendment. As the Court correctly held, the Trustee was the only person with legal authority to execute the First Amendment on behalf of Petitioners. The Trustee, who had sole authority to act, did execute and ratify the First Amendment and there was no evidence that the Trustee relied on the presence of Philip J. Brown's signature in deciding to sign himself (Appendix, p. 24a, n.2). Thus, even if Petitioners' "new evidence" were true—an issue the District Court did not reach—it was not material.

In addition to finding that the allegations of forgery were not material, the Court also found that the allegations were not truly newly discovered evidence, *i.e.*, that the forgery could and should have been discovered by Petitioners in advance of the May 13, 1986 judgment by an exercise of due diligence. Standing alone, this is a sufficient ground for the District Court's decision.

Finally, Petitioners do not even address the District Court's last alternative ground for denying the Rule 60(b) motion, namely, that the motion was not filed within a reasonable time as required by the Rule. The District Court noted that Petitioners should have been aware of the alleged "forgery" no later than its May 13, 1986 order, but held that if Petitioners' belated "discovery" in December 1986 were excusable, Petitioners nevertheless waited an unreasonable time thereafter to file their motion. Petitioners still have not presented any explanation for the delay.

On these facts, the District Court acted well within its discretion in denying the motion as untimely, particu-

larly since, as the Court stated, "many parties have come to rely on our judgment." (Appendix p. 28a). *See generally*, 11 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2866, at 228-29 (1973) ("courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner.") (citations omitted). *See also Central Operating Co. v. Utility Workers of America*, 491 F.2d 245, 253 (4th Cir. 1974) (district court did not abuse discretion in denying relief under Rule 60(b)(1) because of unexplained four-month delay in bringing motion); *MacLeod v. D.C. Transit System, Inc.*, 283 F.2d 194, 195 (D.C. Cir. 1960) (per Burger, C.J.) (delay of one year less two days afforded district court basis for denying motion).

In weighing the factors to be considered on a Rule 60(b) motion, Judge Pratt was uniquely situated for the sound exercise of discretion required. The Court had presided over the litigation and related litigation for over a year. See *infra* at 8, n.1. The Court was well-acquainted with Petitioners' claims and the history of the litigation preceding the Rule 60(b) motion. The Court of Appeals gave appropriate weight to Judge Pratt's discretion in summarily affirming his order.

CONCLUSION

Petitioners have failed to establish grounds for the granting of a writ of certiorari. The lower courts' decisions were in accord with established law under Fed.R. Civ.P. 60(b). The trial court in the exercise of its discretion considered all factors and denied the motion for relief from judgment on alternative and sufficient grounds. Petitioners in attempting to fabricate an inter-circuit conflict have distorted the record and the clear text of the opinions below. This is not a case of unsettled legal issues but rather one focused solely on the district

court's discretion to deny relief. That decision should be upheld and the petition for writ of certiorari denied.

Respectfully submitted,

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October 26, 1988

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-474

1250 — 24th STREET ASSOCIATES
LIMITED PARTNERSHIP, *et al.*,
Plaintiffs,

v.

PHILIP J. BROWN, *et al.*,
Defendants.

[Filed May 13, 1986]

MEMORANDUM OPINION

Before the court are, it is hoped, the last of a long series of motions filed by the various parties. This hotly contested litigation arises out of a dispute over a 99-year Ground Lease of commercial property located at 1250 24th Street, N.W., Washington, D.C. Plaintiffs, tenants under the Ground Lease, brought this action to enforce the terms of the lease and to obtain other relief. Defendants are debtors in bankruptcy who own the property and the bankruptcy Trustee.[1] The defendants now move for permission to file a third notice of default on the lease while plaintiffs move for partial summary judgment.

Background

On December 22, 1981, Philip Brown, B&W Management, Inc. and William Brown filed for protection under Chapter 11 of the United States Bankruptcy Code. On May 20, 1982, the Bankruptcy Court ordered an exami-

[1] Unless otherwise indicated, the term "defendants" in this opinion shall hereafter refer only to the debtor-defendants.

nation of the business operations and financial condition of the debtors by Bert Ely, a corporate financial consultant. Upon the recommendation by this examiner, the Bankruptcy Court, on July 22, 1982, appointed a Trustee to manage the property. On November 8, 1983, the Trustee filed an Amended Plan of Arrangement. The centerpiece of this plan was a set of agreements between The Kaempfer Company, as lessee and the defendants, as landlord, specifically a 99-year Ground Lease of the property located at 1250 24th Street, N.W. together with a related stock purchase and loan agreement. On January 10, 1984, the Bankruptcy Court confirmed the Amended Plan of Arrangement, and on appeal by the debtors, the United States District Court on July 27, 1984 affirmed the Bankruptcy Court's order. Backed by a $38.5 million loan from American Security Bank, construction of a commercial building on the property has begun.

The Ground Lease established a complex formula for calculating rent based on the property's "Floor Area Ratio," or FAR. Under the lease, annual rent equals (a) FAR, multiplied by (b) $52.50, the agreed value per FAR square foot, multiplied by (c) the number of square feet of property, multiplied by 11%, the agreed discount rate. Relying on a provision in the lease relating to additions to improvements, defendants contend that rent depends on *actual* floor area of rentable space, rather than the product of FAR and the number of square feet of the land itself. Plaintiffs adhere to the FAR formula set forth in the Ground Lease.

At the time the Ground Lease was signed, the commercial FAR for the property was 3.0. On December 23, 1983, the parties executed the First Amendment to the Ground Lease. This agreement recognized that "Landlord and Tenant desire to seek a rezoning of the Land to increase the commercial FAR attributable to the Land." First Amendment at 2. It further provided that plaintiffs, the Tenant, could deduct from the ground rent "Re-

zoning Costs," defined to include the costs expended in obtaining the additional FAR as a result of the "rezoning effort." *Id.* at 3. On April 8, 1985, the District of Columbia Zoning Commission granted plaintiffs' Planned Unit Development (PUD) application and increased the FAR for 1250 24th Street from 3.0 to 4.5. Plaintiffs incurred costs of $986,420.20 in obtaining this additional FAR, and they now seek to deduct the appropriate portion of that amount from their rent. Characterizing the PUD process as a "variance" rather than a "rezoning," and therefore not a "rezoning cost", defendants challenge plaintiffs' right to so offset their rent.

The Ground Lease dispute extends beyond the calculation of rent. In January 1986, defendants issued two notices of default on the lease. These notices concerned the paint shade and facade glass and the assignment of the lease to American Security Bank as collateral for the construction loan.

On January 24, 1986, plaintiffs, assignees of the lease, and Joseph Kaempfer, brought the present action. Filed in Bankruptcy Court, the complaint averred that the two default notices were invalid (Counts I & II), that the FAR formula in the Ground Lease governs calculation of the annual rent (Count III), that plaintiffs are entitled to deduct the costs incurred in obtaining the PUD with the increase in FAR (Count IV), and that the court should enter a permanent injunction to prohibit defendants from issuing any future default notice without a prior determination by this court that the notice is filed in good faith and is not frivolous (Count V). Defendants have counterclaimed with the allegations that through their negotiations with plaintiffs, plaintiffs defrauded defendants out of the full rent for the property (Counts I & II), that there should be no reduction in rent for the PUD costs (Count III), that plaintiffs owe Philip Brown $50,000, the first installment under a certain "Cooperation Agreement" (Count IV), that the two default notices

were valid (Counts V and VI), that plaintiffs breached an agreement to support the Browns in attacking the confirmation order (Count VII), and that defendants suffered emotional damages in the amount of $2 million (Count VIII). Defendants also requested a total of $8 million in punitive damages. Defendants' claim for damages, together with their jury demand, prompted the Bankruptcy Court to refer the adversarial litigation to this court.

On March 12, 1985, Judge Oberdorfer, sitting as motions judge, granted in part plaintiffs' motion for partial summary judgment and invalidated the two default notices (Notices No. 1 and No. 2) on the ground that the Trustee, who had sole authority to act, had not ratified and consented to issuance of the notices. Judge Oberdorfer also enjoined the issuance of future default notices unless either ratified by the Trustee or otherwise approved by this court or the Bankruptcy Court.

Pursuant to Judge Oberdorfer's injunction, defendants now move for permission from this court to issue a third notice of default. The proposed notice focuses on the side walls of the existing building at 1250 24th Street, the former Black and White Taxicab garage. Defendants contend that plaintiffs' obligation to preserve the east brick facade includes the "side arms," the approximately twenty feet of brick wall extending around the north and south sides. Plaintiffs have demolished these side walls, and the defendants view this action as a default on the Ground Lease. The bankruptcy Trustee has refused to ratify this default notice.

Judge Oberdorfer's order of March 12, 1986 effectively disposed of Counts I and II of the complaint and Counts V and VI of the counterclaim. Plaintiffs move now for partial summary judgment on the remaining counts of both the complaint and the counterclaim.

Discussion

We will address the two motions separately.

I. *Defendants' Motion for Permission to Issue a Third Notice of Default*

Defendants have utterly failed to prove that plaintiffs defaulted on the Ground Lease when they abolished the side walls. The Ground Lease contains no provision relating to preservation of these walls. Thus, plaintiffs could not have breached a term of the lease itself.

Apparently acknowledging this fact, defendants appear to rely on Zoning Commission Order No. 453, which granted plaintiffs' PUD application. This reliance is misplaced. Again there is no mention of the side walls. The Order mandates preservation only of the "east facade of the existing B&W Garage," or the front of the building. Defendants do not claim that plaintiffs have harmed the front facade. The Order's use of the word "bow-shaped" also fails to support defendants' position. The record amply demonstrates that "bow-shaped" describes the proposed structure, not the existing garage. *See* Second affidavit of John Nicolosi and Ex. B. Similarly, defendants' emphasis on community concern for preserving the side walls ignores the simple fact that neither document binding on the plaintiffs—the Ground Lease or the Zoning Commission Order No. 453—even mentions the side walls. Defendants' claim is without merit.

The Trustee has refused to consent to issuance of this third notice of default. We would be hard put to find that the Trustee acted so unreasonably that we should reverse his decision. Accordingly, we deny defendants' motion for permission to issue a third default notice.

II. *Plaintiffs' Motion for Partial Summary Judgment*

At the outset we note the overwhelming weight of authority that summary judgment is appropriate only if

the moving party demonstrates both absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Bloomgarden v. Coyer*, 479 F.2d 201 (D.C. Cir. 1973). While summary judgment is properly invoked when it eliminates a time consuming and unnecessary trial, *Bloomgarden*, 479 F.2d at 206, it is recognized to be an extreme remedy and should be awarded only when the truth is clear. *Weiss v. Kay Jewelry Stores, Inc.*, 470 F.2d 1259, 1262 (D.C. Cir. 1972). With these principles in mind, we turn to the specific counts on which plaintiffs seeks summary judgment.

A. *Ground Rent (Complaint Count III; Counterclaim Counts I & II)*

On its face, the Ground Lease clearly confirms plaintiffs' calculation of the annual rent. Plaintiffs contend in Count III of the complaint that rent for the first 3.0 FAR should be $804,657.88. This sum accurately reflects application of the FAR rent formula in the lease: 3.0 FAR, multiplied by $52.50, multiplied by the number of square feet of land, surveyed to be 46,444.9, multiplied by 11%. The terms governing the calculation of annual rent are clear and unambiguous.

Defendants' attempt to inject ambiguity into this computation is unpersuasive and has no merit. They assert that if the Ground Lease does not expressly incorporate their reliance on actual rentable floor area, there is at least uncertainty on this question. In support, they point specifically to a provision in the Ground Lease, ¶ 3.1(i), providing for adjustment to the ground rent in the event of additions to improvements. We find no ambiguity in the provision as written. To begin with, it clearly does not provide for additional rent for rentable *cellar* space, as defendants contend. Adjustment occurs only for improvements utilizing the *additional* FAR obtained.

Furthermore, the FAR framework continues to apply to any additions under this subparagraph. The term "actual FAR square footage utilized in such additions"—the factor to be multiplied by $52.50 and 11%—demonstrates that the product of FAR times the square feet of land used in the addition is the focal point for rent. Defendants' new term "Floor Area" (FA) disregards the express inclusion of the term FAR, or Floor Area *Ratio*, in this provision.

The First Amendment supports our reading of the Ground Lease. It outlines the rent formula for the property if the land is allocated additional FAR as a result of a rezoning effort. This formula explicitly tracks the basic FAR formula of the Ground Lease. If accepted, defendants' interpretation of ¶ 3.1(i) of the Ground Lease would create an irreconciliable conflict with the unequivocal language of the First Amendment.

Defendants' evidence of the parties' intent is irrelevant. Defendants stress that throughout negotiations the parties agreed that rent would apply to all rentable floor area, including the cellar space. However, we find that the language of the Ground Lease and First Amendment unambiguously contradict this "floor area" approach. When a contract is clear on its face, a court may not consider evidence of what the parties meant. *E.P. Hinkel & Co., Inc. v. Manhattan Co.*, 506 F.2d 201, 204 (D.C. Cir. 1974); *Gagnon v. Wright*, 201 A.2d 196 (D.C. 1964). The December 31, 1982 letter of intent and other extrinsic evidence of intent cannot overcome the plain words of the lease itself.

Defendants in a fall back position argue that even if the Ground Lease rent formula is not ambiguous, we should set it aside for fraud in the inducement of the rent formula which would deprive them of the rent properly due for the cellar space (Counterclaim Count I) and the additional 1.5 FAR (Counterclaim Count II). The Ground Lease which they wish to undermine represents

the key feature of the Amended Plan of Arrangement, and thus is an integral part of the Bankruptcy Court's order of January 10, 1984 confirming the Plan. While defendants by timely challenge might not have been barred from attempting to modify the Amended Plan of Arrangement, it is now far too late for them to do so through their belated claims of fraud. Plaintiffs' response is twofold.

Plaintiffs argue that 11 U.S.C. § 1127 bars the fraud claim. Under § 1127(b), a reorganized debtor may modify a plan of arrangement at anytime after confirmation but before "substantial consummation" of the plan. We agree that in seeking to substitute their own rent formula for the FAR formula outlined in the Ground Lease, defendants in effect seek to modify the Amended Plan of Arrangement, which incorporated the terms of the Ground Lease, and that they may do so at any time after confirmation of such plan and *before substantial consummation of such plan.* Plaintiffs have not established, however, that there has been "substantial consummation" of the Plan, as that term is defined by 11 U.S.C. § 1101(2). Although the closing on the Kaempfer Agreements occurred on November 29, 1984, the Trustee's continued management of the property appears to us to violate the second element of that definition: "(B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; . . . ." This aspect of the matter, *i.e.*, what constitutes substantial confirmation, is admittedly not free of doubt.

However one decides the issue of "substantial consummation," defendants' fraud claims cannot overcome the alternative bar of 11 U.S.C. § 1144. Under § 1144, a confirmation order may be revoked "at any time before 180 days after the date of the entry of the order of confirmation" if the order was procured by fraud. Defendants do not allege that plaintiffs made any misrepre-

sentations directly to the Bankruptcy Court. If, however, there was fraud in the lease negotiations leading up to the Amended Plan of Arrangement, this fraud would have indirectly led to the "procurement" of the Confirmation Order, since in confirming the Amended Plan of Arrangement, the Bankruptcy Court necessarily assumed that the lease agreement, the key feature of the Plan, was valid. The Confirmation Order was entered on January 10, 1984 and defendants had 180 days to act.[2] They did not do so. Instead, defendants first raised their fraud allegations in the counterclaim, filed February 3, 1986, more than two years later. Defendants' failure to bring their fraud claims within the statutorily mandated time period thus bars our consideration of those claims altogether. This is not the only reason for our denial of defendants' claims of fraud.

Even if defendants' fraud claims were not procedurally barred, they would fail on grounds of insufficiency, Defendants allege that plaintiffs' "malicious, intentional and willful, deceptive, bad faith and fraudulent conduct" defrauded them out of the rent both for the cellar space and for the additional floor area achieved as a result of the PUD "variance" process. Counterclaim Counts I & II. Defendants have completely failed to allege with particularity the elements of an actionable claim of fraud. There must be a misrepresentation of material facts and reliance on such misrepresentation. But reliance alone

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[2] In their latest filing of May 5, 1986, defendants make two interesting concessions. They do not challenge the validity of the confirmation order of January 10, 1984, and admit that their right to upset the order on the basis of fraud expired 180 days after entry of the order. Defendants' Supplemental Memo. in Oppos., ¶¶ 1-3. In a display of rare ingenuity, they attempt to separate the lease from the confirmation order, approving the Amended Plan of Arrangement containing the lease, and assert, that because the lease was not actually executed until November, 1984, they have an actionable claim of fraud. *Id.*, 9-11. We dismiss this argument as frivolous.

is not enough. There must be reasonable reliance. *Isen v. Calvert Corp.*, 379 F.2d 126, 130 & n.12 (D.C. Cir. 1967). Defendants had a duty to read the contract, *Urban Investments, Inc. v. Branham*, 464 A.2d 93, 98 (D.C. 1983); *Hollywood Credit Clothing Co. v. Gibson*, 188 A.2d 348, 349 (D.C. 1963), and their initials on each page indicates that they did. Having read the contract, defendants could not have justifiably relied on plaintiffs' representations, real or imagined, as to what the contract provided. *See Urban Investment*, 464 A.2d at 98 n.6 (purchaser who visited property could not justifiably rely on vendor's statements as to property's existing condition).

On the contrary, the record suggests that defendants understood all along that the Ground Lease provided only for rent based on FAR. In September of 1984, defendants moved to modify the Amended Plan of Arrangement to substitute another developer, Trammel Crow Company partnership, for the Kaempfer Company as the tenant at 1250 24th Street. Defendants preferred Trammel Crow because the proposed lease agreement with this developer would have produced more rent than the Kaempfer Ground Lease. In comparing rental payments under the two leases, defendants themselves used the FAR formula set out in the Ground Lease. *See* Annex A to Debtors' Disclosure Statement to Modified Plan of Arrangement. In view of their own application of the FAR rent formula, defendants cannot claim they have always believed rent was tied to floor area rather than Floor Area Ratio.[3]

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[3] As plaintiffs note, defendants' earlier attempt to modify the Amended Plan of Arrangement to substitute Trammel Crow for Kaempfer invokes the bar of *res judicata*, or claim preclusion. Under this doctrine, once a cause of action has been presented for final adjudication and a valid, final judgment has been entered, a party cannot assert the same cause of action in subsequent litigation. Semler v. Psychiatric Institute of Washington, D.C., 575 F.2d 922, 927 (D.C. Cir. 1978). Defendants attempt here again to

For the reasons stated, we hold that Counts I and II of the counterclaim are without merit and fail as a matter of law. Since defendants have raised no genuine issue of material fact, we grant summary judgment for plaintiffs on these two counts of the counterclaim and on Count III of the complaint.

B. *Rezoning Costs (Complaint Count IV; Counterclaim Count III)*

Plaintiffs are entitled to deduct as "rezoning costs" the expenses incurred in obtaining the additional 1.5 FAR. Defendants challenge the deduction solely on the ground that the PUD process represented a "variance," not a "rezoning." Yet nothing in the record remotely supports defendants' interpretation. The First Amendment itself equates an increase in FAR with rezoning. It recognizes the parties' "desire to seek a rezoning of the Land to increase the commercial FAR attributable to the Land." And it specifically defines "Rezoning Costs" as "the total amount expended by Tenant, to (i) obtain the additional FAR . . . ."

Furthermore, plaintiffs properly note that it was the Zoning Commission, not the Board of Zoning Adjustment, that granted the PUD application. Unlike the Board of Zoning Adjustment, which establishes "variances" and "special exceptions" to Zoning Commission rules, D.C. Code § 5-424(g), the Zoning Commission creates zones and regulates construction within those zones. D.C. Code § 5-413. The Zoning Commission does not grant "vari-

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modify the Plan by changing the rent provisions, despite dismissal of their appeals from the Bankruptcy Court's order denying their previous motion to modify. This final adjudication not only generally bars the present attempt to modify the Plan: it specifically bars the fraud claims, since defendants could have raised them in the earlier proceeding, but failed to do so. *See* Tutt v. Doby, 459 F.2d 1195, 1197 (D.C. Cir. 1972) (*res judicata* bars not only matters which were determined but those which might have been determined).

ances." This division of authority confirms the long practice in this jurisdiction that the Board of Zoning Adjustment alone is the body that grants variances, while the Zoning Commission, which granted the increased FAR, only zones or rezones.

The practical steps of the PUD process endorse this dichotomy. Zoning Commission regulations require that before issuance of a building permit to a successful PUD applicant, the applicant must record a covenant in the D.C. land records binding the owners and their successors to use the property in accordance with the PUD. Plaintiffs recorded such a covenant. The Zoning Commission regulations then mandate an amendment to the Zoning Map to designate the boundaries of the PUD. Thus, the PUD process here culminated in an actual amendment to the Zoning Map by the body authorized to rezone land. The fact that the overall zone itself never changed is irrelevant. Count III of the counterclaim also fails as a matter of law.

Pursuant to the First Amendment, plaintiffs therefore owe defendants $260,801.95 in rent for the additional 1.5 FAR. For the costs of obtaining the rezoning, the First Amendment provides first that the additional FAR be multiplied by both the agreed value per FAR square foot, or $52.50, and the number of square feet of property, or 46,444.9. The result, $3,675,535.80 [4] is then reduced by 100% of the first $750,000 of rezoning costs, and 50% of the excess rezoning costs up to $1,250,000. Plaintiffs claim a total of $986,420.20 in rezoning costs. Thus, they seek to deduct $868,210.10 ($750,000 + ½ of $236,420.20), this latter figure being derived by subtracting $750,000 from $986,420.20. We agree with the Trustee that defendants, as the beneficiaries of the FAR 1.5 rezoning are liable for allowable costs. Since on this

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[4] Plaintiffs' math is off by $0.10.

record,[5] we cannot determine the exact amount of these costs, we hold that this matter should be referred to arbitration (also as suggested by the Trustee) or settled by negotiation between the parties. We therefore grant plaintiffs' moiton on Count IV and deny Count III of defendants' counterclaim.

C. *Cooperation Agreement (Counterclaim Count IV)*

Defendants' demand for payment under the Cooperation Agreement ignores the plain language of that agreement. The parties agreed that upon fulfillment of certain conditions, Associates would pay Philip Brown $150,000. The first payment of $50,000 would be due "upon release of Philip Brown from Chapter 11 or upon issuance of all building permits to build an office building with a commercial FAR of not less than 4 on the Property, *whichever is later.*" Cooperation Agreement at 2 (emphasis supplied). The Bankruptcy Court has not yet released Philip Brown from Chapter 11. Thus, the condition precedent to payment has not been met. We grant summary judgment for plaintiffs on this count.

D. *Duty to Support Defendants' Litigation Position (Counterclaim Count VII)*

Defendants seek damages for breach of an alleged agreement that is unenforceable. Defendants allege that plaintiffs had agreed to support the Browns in their efforts to reverse the Bankruptcy Court's Confirmation Order as to the sequence of closing. Under the Amended Plan of Arrangement approved by that Order, defendants could not close the Kaempfer agreements until they had first closed on an agreement selling FAR rights to the Bureau of National Affairs, Washington. Defendants sought to close the Kaempfer agreements first so

[5] Although the exhibits attached to the Third Affidavit of Mary Matterhead are voluminous and detailed, we do not believe that defendants at this juncture should be foreclosed from challenging specific items.

that they could use the resulting funds to pay their creditors. In March of 1984, they moved to modify the Confirmation Order to reverse the closing sequence of the two agreements. Plaintiffs filed a short brief in support of defendants, but at the hearing apparently stated they would accept whatever sequence the Bankruptcy Court and Trustee deemed appropriate. The ultimate decision was one for the Bankruptcy Court to make. This claim borders on frivolity.

Even if plaintiffs orally promised to support defendants at the hearing, there was no consideration for this promise. Defendants refer only to the advantages plaintiffs would enjoy if the Kaempfer agreements were consummated first, including an earlier start to construction and free rent until January 1, 1986. Yet these benefits were not offered in exchange for a litigation promise but derived gratuitously from the Ground Lease. Defendants cannot turn a pre-existing contract into new consideration. *See Murray v. Lichtman*, 339 F.2d 749, 752 n.5 (D.C. Cir. 1964).

It also might be argued that the alleged agreement is similarly invalid for incapacity. Still involved in bankruptcy proceedings, defendants lacked the capacity to form contracts independent of the Trustee. Since the trustee did not join in the alleged agreement, defendants cannot now enforce it. Counterclaim VII has no substance.

E. *Emotional Distress*
(Counterclaim Count VIII)

Defendants' emotional distress claim likewise fails to state a claim upon which relief can be granted. Defendants seek $2 million as compensation for "mental damage, emotional strain, and the humiliation and embarrassment suffered by the members of the Brown family as a result of the malicious, intentional and willful, deceptive and fraudulent conduct of Plaintiffs . . . ." Counterclaim Count VIII. Although defendants' "purple

prose" obscures the precise legal injury alleged, we can discern no legal theory that could entitle them to recovery.

If defendants under this Count seek damages for the emotional aftermath of fraudulent misrepresentation, their claim fails as a matter of law. Defendants have not alleged or established the key ingredient of recovery for the tort of fraudulent misrepresentation—pecuniary loss proximately caused by reliance on the misrepresentation. *See Day v. Avery*, 548 F.2d 1018, 1029 (D.C. Cir. 1976). Their sweeping allegations of mental damage, humiliation, etc. make no mention of financial harm. Similarly, they have not established that any misrepresentations by plaintiffs "proximately caused" their emotional injuries. *See, e.g., id.* at 1028 & n.53.

If, in the alternative, we interpret defendants' Count VIII as resting on a theory of intentional infliction of emotional distress, their claim again cannot succeed. In the District of Columbia, this tort consists of "(1) 'extreme and outrageous' conduct on the part of the defendant which (2) intentionally and recklessly (3) causes the Plaintiff 'severe emotional distress.'" *Sere v. Group Hospitalization, Inc.*, 443 A.2d 33, 37 (D.C. 1982) (*quoting* Restatement (Second) of Torts § 46 (1965), *cert. denied*, 459 U.S. 912 (1982)). In order to trigger liability, plaintiffs' behavior must have gone "beyond all possible bounds of decency" and be "regarded as atrocious and utterly intolerable in a civilized community." *Waldon v. Covington*, 415 A.2d 1070, 1076 (D.C. Cir. 1980). Even if we accept as true all the allegations in the complaint, plaintiffs' conduct falls far short of the "atrocious" and "utterly intolerable" level necessary for liability. We grant summary judgment for plaintiff on Count VIII of the Counterclaim.[6]

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[6] Since none of defendants' counts survive this motion for summary judgment, we do not need to reach their prayer for punitive damages.

F. *Permanent Injunction (Complaint Count V)*

Plaintiffs seek a permanent injunction to prevent defendants from issuing any future default notices without a prior determination by this court that the notice is made in good faith and is not frivolous. The traditional basis for injunctive relief is a showing of irreparable injury and inadequacy of legal remedies. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959); *Reed Enterprises v. Corcoran*, 354 F.2d 519, 522 (D.C. Cir. 1965). The facts of this case satisfy both requirements.

Plaintiffs will suffer irreparable injury if we do not grant the requested injunction. Defendants have already issued two procedurally defective default notices and seek to have a third default issued. This series of spurious notices hardly reflects mere coincidence: defendants appear determined somehow to find the plaintiffs in default and thereby to torpedo the entire enterprise. It is abundantly clear that issuance of similarly invalid notices will jeopardize plaintiffs' entire development at 1250 24th Street. As plaintiffs explain, a notice of default from the landlord itself operates as a default on the Leasehold Deed of Trust securing the construction loan from American Security Bank. *See* Pl. Memo. at 32 & n.37. Unless plaintiffs can obtain judicial relief within thirty days of the date of the notice—a difficult task for both plaintiffs to meet and the court to accommodate—the Bank is entitled to cut off all additional advances under the loan. *Id.* at 32-33. Without funds, plaintiffs could not continue construction and would likely be unable to obtain permanent financing. In short, every notice of default, no matter how frivolous and without merit, threatens to destroy plaintiffs' entire investment in the property.

There is no adequate alternative remedy at law. Plaintiffs' development plans involve millions of dollars. Even if defendants, now in bankruptcy proceedings, could com-

pensate plaintiffs for the financial loss likely to result, it would be too late to save plaintiffs' business reputations from injury and full development of the property could be permanently delayed or prevented.

Furthermore, the balance of interests favors granting a permanent injunction. The irreparable injury to plaintiffs far outweighs the limited inconvenience to defendants. Defendants complain that the injunction would subject them to an "overseer" and would deprive them of their "civil rights" under the lease. Def. Opp. at 17. While we have a problem in understanding defendants' use of the term "civil rights" in this context, we acknowledge that the injunction would prevent defendants from freely issuing default notices: restraint is our definite intent. We find, however, that the injunction would not unreasonably constrict defendants. To begin with, defendants need only to submit the proposed notice of default with a supporting affidavit to show that it is not frivolous. We expect that this procedure would deter defendants from continuing to press spurious notices. Furthermore, the injunction that we would frame would extend only until construction has finished and plaintiffs have secured permanent financing.[7]

In addition to the limited harm to defendants, the public interest favors a permanent injunction. The Ground Lease provided the cornerstone for the Amended Plan of Arrangement, and thus defendants' ability to pay their creditors. Important considerations of public policy militate in favor of encouraging contracts with bankrupt parties and of ensuring to plaintiffs the benefit of their bargain, including quiet enjoyment of the property they have leased, all combine to protect against unwarranted

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[7] Plaintiffs seek an injunction that would last the entire term of the lease. Once they have finished construction and obtained permanent financing, however, the threat of irreparable injury, the justification for the injunction, would largely be obviated.

attempts to undermine the Ground Lease. We will grant the injunction.

In summary, we grant plaintiffs' motion for summary judgment on all counts of the Complaint and Counterclaim. We find no issue of material fact in dispute and conclude that plaintiffs are entitled to judgment as a matter of law. Since this motion addresses all counts remaining in the case, we will also dismiss the case with prejudice. In view of this opinion, plaintiffs' pending motion to quash a subpoena and for a protective order will be denied as moot.

An order consistent with the foregoing has been entered this day.

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

Date 13 May 1986.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-474

1250 - 24th STREET ASSOCIATES LIMITED PARTNERSHIP, *et al.*,
Plaintiffs,

v.

PHILIP J. BROWN, *et al.*,
Defendants.

[Filed May 13, 1986]

ORDER

We have considered defendants' motion for permission to issue a third notice of default and plaintiffs' motion for partial summary judgment, the responses thereto and the entire record. We find there are no issues of material fact. For reasons set out in the accompanying memorandum opinion, it is by the court this 13th day of May, 1986,

ORDERED that defendants' motion for permission to issue a third notice of default is denied, and it is

ORDERED that plaintiffs' motion for partial summary judgment on Counts III, IV, and V and for judgment and/or dismissal of defendants' Counterclaims I, II, III, IV, VII, and VIII is granted, and it is

ORDERED that defendants' Notices of Default Nos. 1, 2 and 3 are invalid and without merit, and it is

ORDERED that until plaintiffs have obtained permanent financing for the development and construction of the commercial structure now being built at 1250 24th Street, N.W., Washington, D.C. defendants Philip J. Brown and William J. Brown, individually and where

applicable in their other capacities (including any capacity which they may have or hereafter acquire as director, officer and shareholder of B&W Management, Inc.), their agents, attorneys, employees and representatives are hereby permanently enjoined from issuing any notice of default under the Ground Lease, without first obtaining the prior approval of this court. This approval shall be based upon a showing to the court that any proposed notice of default is made in good faith and with a substantial and reasonable basis and where appropriate shall be subject to the requirements of Fed. R. Civ. P. 11, and it is

ORDERED that plaintiffs' pending motion to quash subpoena and for a protective order is denied as moot; and it is

FURTHER ORDERED that this action be dismissed with prejudice.

/s/ John H. Pratt
JOHN H. PRATT,
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-7007

September Term, 1986

C.A. 86-00474

1250 TWENTY-FOURTH ST. ASSOCIATES, *et al.*

v.

PHILLIP J. BROWN, *et al.*,
Appellants

[Filed Dec. 15, 1986]

BEFORE: Ruth B. Ginsburg, Williams, and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of appellees' Motion for Summary Affirmance, appellants' Opposition, and appellees' Reply thereto; and of appellants' Motion for Enlargement of Time to Respond to Motion for Summary Affirmance and appellees, response thereto; and of appellees' Motion for Consideration of Disciplinary Action, it is

ORDERED that the motion for summary affirmance be granted for the reasons set forth in the accompanying memorandum. It is

FURTHER ORDERED that the motion for enlargement of time be granted. The Clerk is directed to file the lodged submissions.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 14.

Per Curiam

*MEMORANDUM**

In ruling on appellees' motion for summary affirmance, the court is under a double constraint. Because the court is reviewing a grant of summary judgment, the record on appeal must be read in the light most advantageous to the appellants, who are resisting summary adjudication. *Abraham v. Graphic Arts International Union*, 660 F.2d 811, 815 n.29 (D.C. Cir. 1981). Moreover, summary affirmance of any district court judgment is appropriate only where the merits of the appeal "are so clear as to justify expedited action." *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.), *cert. denied*, 449 U.S. 994 (1980).

Despite this very strict standard, the court grants the motion for summary affirmance. The district court properly held that the lease unambiguously employs the term "Floor Area Ratio" as defined in the applicable District of Columbia zoning rules and regulations. *See* D.C. Mun. Regs., tit. 11, § 1202 (1983). Having correctly found that the language of the lease is unambiguous, the district court was compelled to refuse to consider extrinsic evidence of the parties' intent. *See NRM Corporation v. Hercules Inc.*, 758 F.2d 676, 682 (D.C. Cir. 1985).

We similarly affirm the district court's dismissal of appellants' allegations of fraud and misrepresentation. Since the language of the lease is unambiguous, and appellants do not deny having read and initialed each page of the lease, appellants fail to state a claim of reasonable reliance on any representation made to them by appellees. Without such an allegation a claim of fraud or misrepresentation is insufficient. *See Isen v. Calvert Corporation*, 379 F.2d 126, 130 (D.C. Cir. 1967).

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* The court has referred the Motion for Consideration of Disciplinary Action to the court's Committee on Admissions and Grievances for its advice. *See* D.C. Cir. Rule 5(g)(2).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-0474

1250 TWENTY-FOURTH STREET ASSOCIATES LIMITED PARTNERSHIP, *et al.*,
Plaintiffs,

v.

PHILLIP J. BROWN, *et al.*,
Defendants.

[Filed Nov. 18, 1987]

MEMORANDUM ORDER

Before us is defendants'[1] Motion for Relief from Judgment pursuant to Fed. R. Civ. P. 60(b)(2). We have previously considered this case on several occasions and will not recite again the detailed background of the present action. *See* Memorandum Opinions of April 28, 1986 and May 13, 1986. A brief review of the chronology is all that is necessary. On May 13, 1986 we issued an order 1) denying defendants' motion for permission to issue a third notice of default; 2) granting plaintiffs' motion for summary judgment with regard to all counts of the complaint and counterclaim; 3) declaring defendants' notices of default Nos. 1, 2 & 3 invalid and without merit; and 4) permanently enjoining defendants and their representatives from issuing any notice of default under the Ground Lease without first obtaining the approval of this court, until plaintiffs obtained per-

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[1] The term "defendants" in this opinion shall hereinafter refer only to the debtor-defendants.

manent financing for the development and construction of the 1250 24th Street project.

On May 23, 1986 defendants moved for reconsideration of our May 13, 1986 order. We denied this motion. Defendants subsequently appealed portions of our decision, and on December 15, 1986 the United States Court of Appeals for the District of Columbia Circuit summarily affirmed. On January 14, 1987 the defendants filed a petition for reconsideration of the Court of Appeals' decision. That petition was denied on February 1, 1987. On May 12, 1987, almost one year after we had issued our May 13, 1986 order, and more than three months after the Appellate Court's most recent denial, defendants filed this Fed. R. Civ. P. 60(b)(2) motion for relief from judgment. After careful consideration of the briefs filed by the parties and the record as a whole, we deny defendants' motion for the reasons stated below.

Discussion

Defendants assert that Philip Brown's signature on the First Amendment to the Ground Lease ("First Amendment") is a forgery, and that the document submitted to this court for its consideration in this litigation shows signs of alteration, and contains a false notarial signature. We find that, even assuming *arguendo* that defendants' assertions are true,[2] denial of this motion is appropriate.

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[2] We find it unnecessary to address whether defendants' assertions are true, because we find that defendants' allegations of forgery are irrelevant as a legal matter. The authenticity of Philip Brown's signature has no bearing on the validity or enforceability of the First Amendment. On December 22, 1981 the defendants filed for protection under Chapter 11 of the United States Bankruptcy Code. The Bankruptcy Court appointed a Trustee to manage the defendants' property on July 22, 1982. On January 10, 1984 the Bankruptcy Court confirmed the Trustee's Amended Plan of Arrangement, including the Ground Lease and the First Amendmetn, and ordered the Trustee to ratify and execute a series of agreements, including the First Amendment. On October 11, 1984

A district court may in its discretion relieve a party from final judgment, order or proceeding pursuant to Fed. R. Civ. P. 60(b)(2) when the party establishes the existence of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." The rule requires that such motions be made "within a reasonable time, but in no case later than one year after judgment. Upon examination of these factors, we find that 1) the evidence in question, if it exists, *could have* been discovered and presented to this court far earlier had defendants exercised due diligence and 2) that defendants failed to file this motion within a "reasonable" period of time after the issuance of our order. We emphasize that each of these findings would be in and of itself sufficient to support our decision in this matter.

A. *Due Diligence*

We find that defendants failed to exercise due diligence in their discovery of the alleged forgery, document alteration and false notarial signature. The moving party bears the burden of showing why it did not discover and present the evidence in question prior to the court's disposition of the matter. *See* 11 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2859, at 184-85 (1973), and cases cited therein. Defendants have failed to demonstrate why they *could not* have discovered the

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the Trustee executed a Certificate of Ratification. The Trustee was the only person with the legal authority to enter into the Ground Lease and First Amendment on behalf of the defendants. While defendants challenge the validity of the Trustee's ratification, we find no merit in these arguments. The Trustee has indicated that his signature on the document is authentic, and that he intended to ratify the First Amendment thereby. Defendants' Reply Memorandum in Support of Motion for Relief from Judgment, Ex. P (Trustee Affidavit). We find no evidence that the Trustee relied on the presence of Philip Brown's signature in deciding to sign himself. In addition, the Trustee has reaffirmed his signature. Trustee Response to Def. Motion for Relief from Judgment, at 1.

evidence in question by the exercise of due diligence. In fact, defendants "discovered" the alleged irregularities in the First Amendment by having Philip Brown and several document experts examine the very same document which had been in their possession during the course of this litigation. Defendants' Memorandum in Support of Motion for Relief from Judgment ("Def. Memo.") at 6. Evidence in the possession of a party *before* judgment is rendered is logically *not* "newly discovered" evidence within the meaning of the Rule. *See* 11 C. Wright and A. Miller, *supra*, § 2859, at 182-83. In any case, defendants clearly had the *ability* to discover the alleged defects in the document long before our judgment.

We also find that defendants demonstrated a lack of diligence in their failure to investigate the validity of the documents once various factors presented themselves. The First Amendment was the focus of attention throughout the course of this litigation. If, as defendants contend, the terms of the First Amendment which Philip Brown actually signed varied from those in the document presented to this court in such a way as to possibly affect the outcome of this litigation,[3] a diligent party would have noted the contrast in terms, or unexplained discrepancies in interpretation, and examined the document to ensure its validity.

In any case, defendants should have questioned the validity of the document immediately following *our* May 13, 1986 order, if not before. Defendants, in what appears to be a virtual admission of their lack of due diligence, assert that they were not on notice of the defects

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[3] The movant bears the burden in the Fed. R. Civ. P. 60(b)(2) context of establishing that the "newly discovered evidence changes the factual picture of a case to such an extent that, under the applicable legal principles, the district court would likely reach a different result." *Washington Mobilization Committee v. Jefferson*, 617 F.2d 848, 850 (D.C. Cir. 1980). Defendants assert that consideration of the "newly discovered" evidence presented would likely alter our decision. We have severe doubts, but express no opinion on this matter at this time.

in the document until they read the Court of Appeals decision of December 15, 1986, noting that "defendants [did] not deny having read and initialed each page" of the First Amendment. This, they assert, triggered Philip Brown's inquiry into the validity of the document. The language in our decision *six months earlier* should have triggered similar concerns. In that order we noted that "[d]efendants had a duty to read the contract, and [that] their initials on each page indicate[d] that they [had done so]." Memorandum Opinion of May 13, 1986 at 12. Phillip Brown's failure to pursue this matter following the entry of *our* decision clearly demonstrates a lack of due diligence regarding the discovery of the evidence in question. But this is not the only defect which undermines defendants' motion for relief from judgment.

B. *Reasonable Time*

A Fed. R. Civ. P. 60(b)(2) motion *must* be denied as untimely if it is filed more than one year after judgment. *Ackerman v. U.S.*, 340 U.S. 193, 197 (1950); *Goland v. CIA*, 607 F.2d 339, (D.C. Cir. 1978). It must be filed within a reasonable time and not more than one year after judgment. While this motion was filed several days before the absolute deadline, we note that the one year time period reflects the "extreme limit" within which a party may file a motion for relief from judgment based on the existence of newly discovered evidence.

We issued the order from which defendants seek relief on May 13, 1986. Defendants filed this motion on May 12, 1987. We find that defendants failed to present a valid justification for their delay in filing, and that in light of all the facts, defendants did not file this motion within a reasonable period of time following our order.

As noted, defendants should have been aware of the alleged irregularities in the document since at least as early as May 13, 1986, when we issued our order. Even assuming, however, that the defendants' late discovery of

the alleged defects in the document in December 1986 was excusable, defendants failed to file this motion until May 12, 1987. Thus it was filed over three months after the Court of Appeals issued its February 1, 1987 order denying defendants' motion for reconsideration without prejudice to their right to move in this court for relief from judgment under Fed. R. Civ. P. 60(b)(2).[4] Defendants present no explanation for their more than three month delay in filing. We find that this delay is sufficient reason alone to find that defendants failed to file this motion within a reasonable time of our initial decision.

Fed. R. Civ. P. 60(b)(2) is designed to "preserve the delicate balance between the sanctity of final judgments . . . and the incessant command of the court's conscience that justice be done. . . ." *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980). The one year limitation regarding the filing of Fed. R. Civ. P. 60(b)(2) motions reflects a policy embodied in the Rule that after one year concerns regarding the finality of judgment *absolutely* outweigh other concerns arising from the existence of newly discovered evidence. While this motion was filed barely within the one year time period, concerns for the sanctity of final judgments likewise weigh heavily here, where many parties have come to rely on our judgment, Plaintiffs' Memorandum in Opposition to Def. Motion for Relief from Judgment, at 11, and where defendants have failed to demonstrate that they exercised due diligence in discovering the defects of the document *within their possession* prior to our judgment, and that they acted within a reasonable period of time after their "discovery" of this evidence, even assuming that their December discovery was excusable.

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[4] We note that the Court of Appeals did not *decide* that defendants had identified newly discovered evidence, as defendants assert, Def. Reply at 23, but rather that defendants were free to file a Fed. R. Civ. P. 60(b)(2) motion if they were so inclined.

Accordingly, it is by the court this 18th day of November, 1987,

ORDERED that defendants' Fed. R. Civ. P. 60(b)(2) motion for relief from judgment is denied.

/s/ John H. Pratt
JOHN H. PRATT,
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

C.A. No. 86-00474

No. 88-7020

1250 TWENTY-FOURTH STREET ASSOCIATES LIMITED PARTNERSHIP, *et al.*

v.

PHILIP J. BROWN, *et al.*,
Appellants

BEFORE: Wald, Chief Judge; Mikva and Edwards, Circuit Judges

[Filed June 28, 1988]

ORDER

Upon consideration of appellees' motion for summary affirmance, the initial and supplemental oppositions thereto, and the reply, it is

ORDERED by the court that appellees' motion for summary affirmance be granted substantially for the reasons stated in the district court's memorandum filed November 18, 1987.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam